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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

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Opinions Below

The opinion of the Court of Appeals (A. 89a) is reported at 370 F. 2d 508. The opinion of the District Court (A. 72a) is reported at 253 F. Supp. 237.

Jurisdiction

The judgments of the Court of Appeals were entered December 16, 1966 (A. 103a-112a). Timely petitions for rehearing and rehearing *in banc* were denied February 6, 1967 (A. 113a-118a). The petition was filed March 20, 1967 and was granted November 6, 1967 (A. 120a). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Treaty Involved

The Treaty of the United States involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929 (hereinafter referred to as the Warsaw Convention). Adherence by the United States was declared June 27, 1934, and the Treaty became effective as to the United States October 29, 1934. 49 Stat. 3000. The relevant Articles of the Treaty are set forth, both in the official French and in English, in the Appendix to this brief, commencing page 37.

Questions Presented

1. Whether Article 3(2) of the Warsaw Convention requires, under the sanction of depriving the carrier of those treaty defenses which exclude or limit its liability, the inclusion in the passenger ticket of either the statement in Article 3(1)(e) or a notice that the Treaty limits the liability of the carrier?

2. Whether the statement in the baggage checks delivered by petitioner, as to the applicability of the liability rules of the Warsaw Convention, satisfies the compulsory requirements of Articles 4(3)(h) and 4(4)?

3. Whether the question of the readability of the passenger tickets and baggage checks should be submitted to a jury?

Statement

On February 26, 1960, a DC-7C aircraft owned and operated by petitioner Alitalia crashed shortly after takeoff from Shannon Airport, Ireland, while on a regularly scheduled flight from Rome, Italy to New York, U. S. A. These

five diversity suits[1] were brought by respondents to recover damages for wrongful death, personal injuries and property loss sustained by thirteen of the forty passengers on board the aircraft at the time of the accident (A. 90a). It was undisputed that the passenger tickets and baggage checks of each of these thirteen passengers provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention and, therefore, that the rights of the parties are governed by the Convention. 370 F. 2d at 510 (A. 91a).

In answering the complaints, Alitalia pleaded several affirmative defenses based upon Articles 20 and 22 of the Convention, pursuant to which Alitalia sought to exclude or limit its liability for the damage alleged (A. 4a-9a). Prior to trial, respondents moved for partial summary judgment dismissing these defenses, asserting that Alitalia had not effectively notified the passengers of the applicability of the Treaty to their transportation and that, therefore, the provisions of the Treaty excluding or limiting Alitalia's liability were unavailable (A. 10a-18a). The District Court agreed with respondents and granted their motion. 253 F. Supp. at 243 (A. 83a). The opinion of the District Court included a certification under 28 U. S. C. 1292(b), 253 F. Supp. at 243, and Alitalia's application for leave to appeal was granted by the Court of Appeals (A. 91a).

By a vote of two to one, Judge Moore dissenting, the Court of Appeals affirmed the order of the District Court (A. 100a). A petition for rehearing was likewise denied (A. 113a-115a). Rehearing *in banc* was denied by a vote of six to three, Judges Moore, Friendly and Hays voting to grant (A. 116a-118a).

[1] Respondents are citizens of the State of New York and petitioner is an Italian corporation with its principal place of business in Rome, Italy. 28 U. S. C. 1332(a)(2). The five separate suits were consolidated in the District Court. (A. 90a).

Both in the District Court and the Court of Appeals, respondents argued that, under Articles 3 and 4 of the Convention, the carrier must notify its passengers that the Treaty applies to their transportation and limits the carrier's liability (A. 16a). In the absence of such notice, according to respondents, the sanctions in Articles 3(2) and 4(4) of the Convention apply, and the carrier may not exclude or limit its liability (A. 16a-17a). Respondents also contended that, if the Treaty requires this notice, the passenger tickets and baggage checks delivered by Alitalia did not give "adequate notice", because the statement in the tickets and checks as to the applicability of the liability rules of the Treaty was not definite, noticeable, readable and understandable to a layman (A. 17a-18a, 63a-65a).

Alitalia contended in the Courts below that the application of the provisions of the Treaty does not depend upon any concepts of notice. In support of this position, Alitalia argued that the Convention itself does not require the inclusion in the passenger ticket and baggage check of any notice that the Treaty excludes or limits the carrier's liability in the event of an accident. Alitalia contended, however, that in any event the passenger tickets and baggage checks delivered in this case, in fact, contained all of the particulars listed in Articles 3 and 4 of the Convention, including a statement as to the applicability of the rules relating to liability established by the Convention (A. 19a-57a, 66a-69a).

The Court below, rejecting a literal reading of the plain language of the convention, and in disregard of the drafting history, held that the provisions of the Convention excluding or limiting liability do not apply unless the passenger tickets and baggage checks contain a notice that the Convention limits the carrier's liability in the event of an accident. 370 F. 2d at 511-513 (A. 94a-97a). The Court

also held that the passenger tickets and baggage checks delivered by Alitalia did not give adequate notice because the statement as to the applicability of the liability rules of the Convention was printed in type too small to be readable. 370 F. 2d at 513-514 (A. 98a-100a).

Summary of Argument

The decision of the Court below is in direct conflict with the clear intent of the parties to the Warsaw Convention, as expressed both in the plain language of the Treaty and its drafting history.

The Warsaw Convention was adopted to unify certain rules relating to the liability of the carrier in international air transportation and the use of transportation documents. Chapter II of the Convention relates to the transportation documents, namely, the passenger ticket, baggage check and air waybill. While the Convention does not specify the form of documents to be used, Articles 3, 4 and 8 do list certain particulars for inclusion in the passenger ticket, baggage check and air waybill, respectively. One of the particulars, which is listed in Articles 3(1)(e), 4(3)(h) and 8(q), is:

> *"A statement that the transportation is subject to the rules relating to liability established by this convention."* 49 Stat. 3015-16.

Articles 4(4) and 9 make the inclusion of this statement in the baggage check and air waybill compulsory by imposing a sanction against the carrier where the statement is omitted. This sanction, when applicable, provides that the carrier shall not be entitled to exoneration or limitation of its liability under the Convention. Articles 4(4) and 9 also impose this sanction against the carrier if no baggage

check is delivered or air waybill made out. 49 Stat. 3015, 3017.

In marked contrast, Article 3 does not impose any sanction against the carrier if the statement listed in Article 3(1)(e) is omitted from the passenger ticket. Article 3(2) imposes the sanction only where no passenger ticket is delivered. 49 Stat. 3015.

The drafting history of the Convention demonstrates clearly that the parties did not intend that the sanction in Article 3(2) extend as far as the sanction in Articles 4(4) and 9. A preliminary draft of the Convention provided that the sanction in Article 3 apply where the passenger ticket omitted the statement as to the applicability of the liability rules of the Convention. After debate, however, the delegates to the Warsaw Conference deleted from the draft of Article 3 that language which would have imposed the sanction where the statement listed in Article 3(1)(e) is omitted from the passenger ticket. IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 167-8 (1930).

In 1955, acting on a proposal of the United States, the Hague Conference amended Article 3(2) to extend the sanction to cases where the passenger ticket fails to contain a statement that the Convention may be applicable and that the Convention limits the liability of the carrier. II International Conference on Private Air Law, ICAO Doc. 7686—LC/140, p. 3 (1955). This and other amendments to the Treaty adopted at the Hague Conference, however, do not apply to the case at bar, since the Hague Protocol amending the Warsaw Convention is not in effect as to the United States.

The Court below, by judicial decision, has written into the Treaty a provision which the plain language of the Treaty itself excludes and which the parties to the Con-

vention had expressly considered and flatly rejected. In addition, the Court below has accomplished what the parties to the Treaty, including the United States, recognized could only be accomplished by treaty amendment.

Application of the provisions of the Warsaw Convention is not based on any concept of notice. *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Ross* v. *Pan American Airways, Inc.*, 299 N.Y. 88, 85 N.E. 2d 880 (1949). Nevertheless, the Court below held that the provisions of the Convention excluding or limiting the carrier's liability do not apply unless the passenger ticket and baggage check give the passenger:

> "notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially." 370 F. 2d at 513.

The Court below has also held that the standard airline passenger ticket and baggage check delivered by Alitalia does not satisfy what it considered to be "notice" requirements of the Convention, even though the ticket and baggage check contained the statement listed in Articles 3(1)(e) and 4(3)(h) of the Convention. The Court below concluded that the passenger ticket and baggage check delivered by Alitalia was ineffective to give "notice" because of the size of the print of the statement and its location on the ticket. In so holding, the Court below has gone counter to every reported case which has considered the adequacy of this statement in the light of treaty requirements, whether it appears in the passenger ticket, baggage check or air waybill.

In any event, the question of readability of the passenger ticket and baggage check should be decided by a jury.

ARGUMENT

I

The plain language of the Warsaw Convention evidences a clear intent that the sanction of absolute unlimited liability in Article 3(2) applies only where no passenger ticket is delivered. No rule of treaty construction permits the extension of this sanction to cases where the delivered passenger ticket fails to contain any of the particulars listed in Article 3(1).

The best evidence of the intent of the parties to the Warsaw Convention is the language employed. As stated by Judge Moore in his dissenting opinion in the Court below:

> *"The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem."* 370 F. 2d at 515 (A. 100a).

As its official title indicates, the Warsaw Convention was concluded in order to unify certain rules relating to international transportation by air. 49 Stat. 3014. In the words of the delegate from Great Britain, Sir Alfred Dennis:

> *"The object of this convention is to insure the uniformity of the law. . . ."*[1]

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[1] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, p. 58 (1930). This document contains all of the recorded Minutes of the Warsaw Conference, and will be cited hereinafter as *"Warsaw Minutes,* ICAO Doc. 7838." The Minutes are recorded in French and all translations in this brief are the Petitioner's.

The preamble to the Convention recognizes "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." 49 Stat. 3014.

Chapter II of the Convention deals with the subject of transportation documents, namely, the passenger ticket, baggage check and air waybill. The Convention does not specify the form of these documents. The preliminary draft of the Convention did contain an Article providing for the use of certain forms of transportation documents, examples of which were appended to the draft. However, this Article and the appended forms were deleted after the delegates determined that the Convention should not require the use of any specific form of transportation documents. *Warsaw Minutes,* ICAO Doc. 7838 p. 110. The delegate from France, M. Ripert, summed up the intent of the Warsaw Conference in this regard when he said:

> *"There is a convention and then some forms. These forms are not compulsory for anyone. The airline companies are free to adopt any transportation documents they want. If the conference expresses a wish, it can only be this one: 'that the airline companies adopt a uniform form'."* *Warsaw Minutes,* ICAO Doc. 7838 p. 110.

The parties to the Convention did determine, however, that it should be compulsory to use transportation documents for the carriage of passengers, baggage and cargo. Thus Article 3(1) states that the carrier "must deliver" a passenger ticket and Article 4(4) states that the carrier "must deliver" a baggage check. 49 Stat. 3015-16. Article 5 provides for the making out of an air waybill for the carriage of goods. 49 Stat. 3016. The use of a passenger ticket,

baggage check and air waybill is made compulsory by Articles 3(2), 4(4) and 9. These Articles contain a sanction depriving the carrier of the benefit of the provisions of the Convention which exclude or limit liability in the event passengers, baggage or cargo are accepted for transportation without a passenger ticket or baggage check having been delivered, or an air waybill having been made out. 49 Stat. 3015, 3016, 3017.

With regard to the contents of the transportation documents, Articles 3(1), 4(3) and 8 list several particulars for inclusion in the passenger ticket, baggage check and air waybill, respectively. Where the parties to the Treaty determined that it should be compulsory for the transportation documents to contain certain of the listed particulars, they did so by imposing the same sanction for the failure of the document to contain the specified particulars, as is imposed where no document is delivered. Thus, the sanction in Article 4(4), with regard to the baggage check, provides:

> *"Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."* 49 Stat. 3015-16.

The particular set out in Article 4(3)(h) is: "A statement that the transportation is subject to the rules relating to liability established by this convention." 49 Stat. 3015.

Similarly, the sanction in Article 9 with regard to the air waybill, provides:

> *"If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i),*

inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability." 49 Stat. 3017.

The particular set out in Article 8(q) is the identical statement as set forth in Article 4(3)(h).

The sanction in Article 3(2), however, with regard to the passenger ticket, is substantially different from the sanctions in Articles 4(4) and 9, and is explicitly limited to the case of non-delivery of a passenger ticket. Unlike the sanctions in Articles 4(4) and 9, the sanction in Article 3(2) does not make it compulsory for the passenger ticket to include any of the particulars listed in Article 3(1). The sanction in Article 3(2) provides:

"Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." 49 Stat. 3015.

In marked contrast are the sanctions in Articles 4(4) and 9, which apply not only for non-delivery of the baggage check or air waybill, but also for the failure of the delivered document to contain certain specified particulars listed in Articles 4(3) and 8. Thus, the inclusion in the baggage check and air waybill of a statement that the transportation is subject to the liability rules of the Convention, which is the particular listed in Articles 4(3)(h) and 8(q), is made compulsory by the sanctions in Articles 4(4) and 9. No comparable language in Article 3(2) makes it compulsory for the passenger ticket to contain the identical statement, which is the particular listed in Article 3(1)(e).

It is clear from a comparative analysis of the plain language of Articles 3(2), 4(4) and 9, that the parties to the

Convention intended to limit the imposition of the sanction in Article 3(2) to cases of non-delivery of the passenger ticket. The parties were explicit in extending the sanction in Articles 4(4) and 9 to cases where the baggage check and air-waybill failed to contain certain specified particulars. There is no such extension of the sanction in Article 3(2).

This clear distinction between Article 3(2) and Articles 4(4) and 9 was recognized by the District Court in *Grey v. American Airlines, Inc.*, 95 F. Supp. 756 (S. D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956). Plaintiff argued in that case that the sanction of Article 3(2) should apply because the passenger tickets did not contain the "agreed stopping places", which is the particular listed in Article 3(1)(c). The question before the Court was:

> *"whether Article 3(2) means that unless a ticket with all the particulars as set forth in Article 3(1), is delivered, the carrier's liability is unlimited."* 95 F. Supp. at 758.

The Court resolved this question solely by reference to the terms of the Convention itself. After analyzing the language of the Convention, particularly that contained in Articles 3(2), 4(4) and 9, the Court concluded:

> *"Article 3(2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4(4) and 9. I must conclude that this omission or difference is most significant. For I cannot agree with plaintiff's argument that Article 3(2) intends that the ticket delivered contain the items set forth in Article 3(1), when those who drafted the treaty were so explicit in this regard in Articles 4(4) and 9."* 95 F. Supp. at 758.

The *Grey* case was followed by the Queen's Bench Division in *Preston* v. *Hunting Air Transp. Ltd.*, [1956] 1 Q. B. 454, where the Court held that the omission of the agreed stopping places from the passenger ticket did not mean that no passenger ticket had been delivered within the meaning of Article 3(2). After comparing the language of Articles 3, 4, 8 and 9 of the Convention, and particularly the sanction provisions, the Court stated:

> *"Having regard to the arguments I have heard I have no doubt in the present case in coming to the conclusion that the fact that this passenger ticket was deficient in that it did not contain the names of agreed stopping places did not mean that no ticket had been delivered, and did not mean that the plaintiffs could take advantage of article 3(2) and pursue their action without any limitation on the amount set out in article 22. . . ."* [1956] 1 Q.B. 454 at 461.

The leading writers on the Warsaw Convention are in agreement that the Treaty does not apply the sanction in Article 3(2) where the passenger ticket fails to contain any of the particulars listed in Article 3(1). DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954); GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1937); SHAWCROSS AND BEAUMONT ON AIR LAW (3d ed. 1966).

Goedhuis states with regard to the sanction in Article 3(2):

> *"The sanction provided for, will only be applied when the carrier has not issued a ticket. As regards the form and the contents of the ticket, no liability devolves on the carrier from the Warsaw Convention. By virtue of the Warsaw Convention, the carrier is free to issue any ticket he wishes, without having to*

include the particulars regarded in article 3." GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 153 (1937).

In comparing the sanction in Article 4(4) regarding the baggage check, with the sanction in Article 3(2), Goedhuis states:

> *"Hitherto, we have only considered the sanction with regard to the baggage check. With regard to the passenger ticket, the sanction has even less value. As it has already been said, the carrier, by virtue of the Warsaw Convention, will be deprived of the benefits of the Convention, if he fails to deliver a ticket, but he will not be deprived of them if he has delivered a ticket which is however not in conformity with the provisions of sub-paragraph 1 of article 3 regarding the form of the ticket. Consequently, he can deliver any kind of ticket, without including any of the particulars required by the Warsaw Convention, since the Convention has not provided for any sanction against such omissions."* GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 156-7 (1937).

Drion states, in comparing the sanction in Article 3(2) with that contained in Articles 4(4) and 9:

> *"Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket only in case of a complete failure to deliver a ticket, and did not want to attach the sanction to the omission of the prescribed particulars. This raises the question of which condition should be*

fulfilled for a slip of paper to become a ticket, the delivery of which will be sufficient for the purpose of Article 3(2). It is believed that any document will do which shows itself to be 'a ticket' for the transportation concerned." DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW ¶251 (1954).

Shawcross and Beaumont in their treatise have also recognized this important distinction between the sanction in Article 3(2) and the sanction in Articles 4(4) and 9. SHAWCROSS AND BEAUMONT ON AIR LAW 439 (3d ed. 1966).

The negotiations surrounding the adoption of the Hague Protocol in 1955, amending the Warsaw Convention in certain respects, remove any doubt that the sanction in Article 3(2) does not apply where the passenger ticket omits the statement listed in Article 3(1)(e). See generally, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 (1955). At the Hague Conference, the parties to the Warsaw Convention agreed on an amendment to Article 3(2) extending the sanction to cases where the delivered passenger ticket fails to contain a statement which notifies the passenger that the Convention may be applicable and that the provisions of the Convention limit the carrier's liability. This amendment resulted from a proposal put forth by the United States at the Conference that the Treaty be amended to make it mandatory for the carrier to notify its passengers that the provisions of the Convention, if applicable, limit the carrier's liability. I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 81, 120 (1955).

The amendment to Article 3(2) adopted at the Hague Conference reads:

"2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the con-

tract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 3 (1955). (Underscoring added).

The Hague Protocol, however, has never been ratified by the United States, is not in force as to the United States and therefore, does not apply to the case at bar. S. EXEC. Doc. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965).

The negotiations surrounding the adoption of the Hague Protocol were considered decisive by the Court in *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), in construing Article 2 of the Warsaw Convention. The question was whether transportation performed under contract for the Military Air Transport Service (MATS) of the United States was subject to the Warsaw Convention. The Court concluded that it was. This conclusion, in the words of the Court, was "unavoidable", because the parties to the Treaty, including the United States, had considered it necessary to amend the Treaty in order to remove MATS flights from the scope of the Warsaw Convention.

The parallel to the case at bar is clear. In order for the sanction in Article 3(2) of the Warsaw Convention to be

applied to cases where the passenger ticket omits the particular listed in Article 3(1)(e), the parties considered it necessary to amend the Treaty as proposed by the United States. In spite of this clear understanding of the parties as to the meaning of the Convention, the Court below has accomplished the same result by judicial decision. As characterized by Judge Moore in his dissenting opinion:

> *"The majority in their opinion indulge in judicial treaty-making.*
>
> • • • • • •
>
> *"The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."* 370 F.2d at 515 (A. 100a-101a).

In the interpretation of a treaty, this Court has consistently refused to construe the language employed to bring within the confines of the treaty a subject the parties clearly intended to omit, or to achieve a result inconsistent with the intention of the parties as expressed in the language of the treaty. *Maximov* v. *United States*, 373 U. S. 49 (1963); *Valentine* v. *United States*, 299 U. S. 5 (1936); *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); *Santovincenzo* v. *Egan*, 284 U. S. 30 (1931). As stated in *Maximov* v. *United States*, 373 U. S. 49 (1963):

> *"Moreover, it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."* 373 U. S. at 54.

In summary, the plain language of Article 3(2) of the Warsaw Convention evidences the clear intention of the parties that the sanction applies only where the carrier accepts a passenger without a passenger ticket having been delivered. No rule of construction permits the extension of the sanction in Article 3(2) to cases where the passenger ticket delivered fails to contain, in effect, the statement in Article 3(1)(e). Related Articles 4(4) and 9 explicitly make the sanction applicable not only where no baggage check is delivered, or no air waybill is made out, but also where these documents fail to contain certain specified particulars among those listed in Articles 4(3) and 8. There is no similar language in Article 3(2) extending this sanction to cases where the passenger ticket fails to contain any of the particulars listed in Article 3(1).

What Justice Story said in *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821) is particularly appropriate:

> "... *[T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.*
>
> "... *[T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have*

chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, . . ." 19 U. S. (6 Wheat.) at 71-73.

II

The drafting history of the Warsaw Convention confirms the intention of the parties to apply the sanction in Article 3(2) only where no passenger ticket is delivered. Article 3 of the preliminary draft of the Convention contained language also imposing this sanction where the passenger ticket did not conform to the Convention. However after consideration by the delegates this language was deleted and Article 3(2) as adopted applies the sanction only for non-delivery of the passenger ticket.

The preliminary draft of the Convention was the product of four years work, and had been submitted to the delegates a year before the Warsaw Conference was convened. *Warsaw Minutes,* ICAO Doc. 7838 pp. 159-60.

The Belgian delegate, M. deVos, presented the report on the preliminary draft to the delegates at the first working session of the Conference. In describing Chapter 2 of the draft which dealt with the subject of transportation documents, M. deVos stated:

"The essential thing, in this regard, is the sanction, the sanction foreseen for the three documents and which consists of withdrawing from the carrier who transports passengers or merchandise without documents, or with documents not conforming to the convention, the benefit of the advantages laid down by

the convention." Warsaw Minutes, ICAO Doc. 7838 p. 15.

M. deVos reported to the Conference that while the preliminary draft of the Convention contemplated the use of a document for the transportation of passengers "necessarily different" from those to be used in the transportation of baggage and cargo, the sanction to be imposed for the transportation of passengers without a ticket, or with a ticket not in conformity with the proposed convention, was to be "identical to that contemplated for the transportation of baggage and cargo." *Warsaw Minutes,* ICAO Doc. 7838 p. 161. Article 3 of the preliminary draft, as presented to the Conference, read:

> *"In the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:*
>
> *a) The place and date of issue;*
>
> *b) The places of departure and destination;*
>
> *c) The route to be followed (via) agreed stopping places;*
>
> *d) The name and address of the carrier or carriers.*
>
> *The passenger ticket must contain, above all, a clause stipulating that the transportation is subject to the rules relating to liability established by this Convention.*
>
> *The absence, irregularity or loss of this passenger ticket shall not prejudice the existence or validity of the contract of transportation.*
>
> *If, for international transportation, the carrier accepts the passenger without a passenger ticket having*

been established, or if the ticket does not contain the particulars indicated above, the contract of transportation will be none the less subject to the rules of this Convention, but the carrier will not have the right to avail himself of those provisions of the Convention which exclude, in whole or in part, his direct responsibility or that derived from the mistakes of his employees." Warsaw Minutes, ICAO Doc. 7838 pp. 167-168. (Underscoring added).

This preliminary draft of Article 3 underwent substantial revision and redrafting during the course of the Conference before it was adopted by the delegates and incorporated in the Treaty. *Warsaw Minutes,* ICAO Doc. 7838 pp. 100-104, 129. The most significant revision developed from the proposal of the Greek delegate that the application of the sanction in the preliminary draft of Article 3 be restricted. He regarded the sanction as too severe a penalty for the mere omission of one of the listed particulars from the passenger ticket. He therefore proposed that the sanction in Article 3 be amended to read:

"If the passenger ticket does not contain one of the above mentioned particulars, then the carrier will be deprived of this right [to exclude in whole or in part his responsibility] *in the case, where, according to the court's judgment, damage will have been caused to the other party by this act". Warsaw Minutes,* ICAO Doc. 7838 p. 197.

He also proposed that the sanction relative to the contents of the baggage check and the air waybill be similarly amended.

The Preparatory Commission, which was established to consider all proposed amendments before submission to the delegates, did not adopt the wording of the amendment proposed by the Greek delegate. The Conference was determined not to leave the resolution of matters of substance under the Convention to national laws. *Warsaw Minutes*, ICAO Doc. 7838 pp. 44-45. The commission, however, went further and agreed to delete entirely from Article 3 the language which would have extended the sanction to cases where the passenger ticket omits any of the listed particulars. The following are the pertinent portions of the comments of the delegates when the revised Article 3 was presented to the Conference for adoption:

> *"M. deVos, Reporter. Gentlemen, Article 3 relates to the passenger ticket and what should be found on the ticket.*
>
> • • • • •
>
> *"These proposals [the listing of additional particulars] were rejected not because they did not figure under the title of passenger transportation: in fact these particulars were there. But because of an observation by the Greek delegate which is the following:*
>
> *The last line of the Article imposes the sanctions in case of the absence of the passenger ticket, or if the passenger ticket does not contain all the particulars indicated, thus the sanction is too severe if it operates upon a simple omission, or on the carelessness of an airline employee—the commission came to an agreement on this point of view and in the last paragraph it took out the words:*
>
> *'or if the ticket does not contain the particulars indicated above.'*
>
> • • • • •

> *"M. Giannini (Italy)—I would like to have the Reporter give us the Article as it is now worded.*
>
> *"M. deVos, Reporter. It is the same text as that in the draft, there is only the omission in letter c) of the agreed stopping places and the addition of the British amendment after editing; and in the last paragraph the omission of 'or if the ticket does not contain the particulars indicated above.'" Warsaw Minutes,* ICAO Doc. 7838 pp. 100-101. (Underscoring added).

After final editing, Article 3 was adopted by the Conference without any language imposing the sanction in Article 3(2) on the carrier for the failure of the passenger ticket to include the particulars listed in Article 3(1). *Warsaw Minutes,* ICAO Doc. 7838 p. 129.

Reporting on the action of the Preparatory Commission with respect to the preliminary draft of Article 4, M. deVos stated:

> *"The last paragraph has not been altered like Article 3; that is to say that we have kept the same sanctions in case of errors in the particulars, now it is only a question, as compulsory particulars, of letters d) f) h)." Warsaw Minutes,* ICAO Doc. 7838 p. 104. (Underscoring added).

Regarding Article 8 and the contents of the air waybill, M. deVos reported:

> *"In the last sentence of the article we have limited the number of compulsory particulars, the other particulars becoming optional." Warsaw Minutes,* ICAO Doc. 7838 p. 106.

Thus none of the particulars listed in Article 3(1) was made compulsory in the passenger ticket, and only certain

specified particulars in Articles 4(3) and 8 were made compulsory in the baggage check and air waybill, the others being merely optional. Those particulars which the parties intended to be compulsory in the transportation documents were specified in the sanction clauses. The sanction in Article 4(4) specifies three compulsory particulars for inclusion in the baggage check, and the sanction in Article 9 specifies ten for inclusion in the air waybill. The sanction in Article 3(2) specifies none for the passenger ticket.

The history of the drafting of the Convention, as summarized above, demonstrates the clear intent of the parties that the sanction in Article 3(2) apply only to cases of non-delivery of the passenger ticket, and that this sanction not apply for the failure of the passenger ticket to include any of the particulars listed in Article 3(1). By applying the sanction in Article 3(2) to a situation where the delivered passenger ticket in effect omits the statement in Article 3(1)(e), the Court below, by judicial decision, has written back into the Treaty a provision which the contracting parties had expressly considered in a preliminary draft and flatly rejected before final adoption.

III

The decision of the Court below is based on the erroneous premise that the provisions of the Warsaw Convention excluding or limiting the carrier's liability apply only where the passenger is given notice that in the event of a crash the amount of recovery is limited very substantially.

Application of the provisions of the Warsaw Convention which exclude or limit the carrier's liability does not depend upon any concept of notice. The Convention, by its own terms, applies automatically whenever the transportation involved is "international transportation" within the meaning of Article 1(2). *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2d Cir. 1966); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956); *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. 2d 880 (1949).

The fundamental error of the Court below was in viewing the Convention as a plan whereby the carrier can limit its liability, provided notice is given to the passenger that in the event of a crash the "amount of recovery . . . is limited very substantially." 370 F.2d at 513 (A. 96a). The Court reasons that this notice is required so that the passenger will have an opportunity to take "self-protective measures," such as the purchase of additional flight insurance. 370 F.2d at 513 (A. 96a).

The concept of "self-protective measures" is inconsistent with the conditions which existed in 1929 in the air transport industry relating to the carrier's liability, for it presupposes that the Convention deprived the passenger of an existing right to unlimited recovery. At the time of the

adoption of the Convention, however, the liability of the carrier to passengers or shippers was determined in most countries solely upon the basis of the terms of the contract of transportation. As a result, the carrier was not responsible in the event of the injury or death of its passengers, or the loss of baggage or cargo, because of exoneration clauses in the contracts. In France and England, for example, the pre-Convention system of liability applicable in air transportation cases was more favorable to the carrier than that established by the Convention.[3]

The delegates to the Warsaw Conference were determined to replace this contractual system of liability with a Convention establishing a system of uniform rules governing a carrier's liability. The proposed rules were designed to establish rights of recovery in favor of passengers and shippers, restrict the circumstances under which the carrier could be exonerated, but limit the carrier's liability. As was stated by the delegate for France, M. Ripert, with regard to the preliminary draft of the Convention:

> "*[T]his Agreement creates an exceptional system against the carrier, for in most countries of the world, the transportation contract is concluded under a free system. The carrier is free to insert in the contract clauses which exclude or reduce his responsibility, for cargo as well as passengers. You can well believe that they have not failed to do this and many airline companies are currently operating under this free contractual system, and in practice, and in actual fact, they are not responsible. One has wanted to impose on them a compulsory law of liability. . . . [The Agreement] is then a compulsory law, for all the carriers,*

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[3] *Warsaw Minutes*, ICAO Doc. 7838 p. 68. For a general discussion of the pre-Convention system of liability in the air transport industry, see *Warsaw Minutes*, ICAO Doc. 7838 pp. 26-37.

a law of responsibility which has been imposed on them." Warsaw Minutes, ICAO Doc. 7838 pp. 32-33.

The Convention, then, was a compromise between differing systems of liability, and the prevailing system of contractual liability was replaced by a system of uniform rules of liability based on the idea of fault and limited liability. *Warsaw Minutes,* ICAO Doc. 7838 p. 92. Contrary to the statement of the Court below, 370 F. 2d at 513, the true *"quid pro quo"* in the Convention for the establishment of the right of recovery in the passenger, without requiring proof of fault, is the limitation of the carrier's liability.

As was stated by the Secretary of State in transmitting the Convention to the President for approval:

> *"It will be observed that while under the terms of the Convention passengers and shippers acquire certain definite rights in international air transportation, the airline carriers obtain the benefit of a limitation of liability."* S. Doc. Exec. G., 73d. Cong. 2d Sess. 4 (1934).

See generally, Drion, Limitation of Liabilities in International Air Law ¶¶30-31 (1955).

The conditions and circumstances leading to the adoption of the Warsaw Convention may no longer exist. As stated by Judge Moore in his dissenting opinion:

> *"The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts."* 370 F. 2d at 515 (A. 100a).

Changed conditions and circumstances cannot affect the rights of the parties to the case at bar because the Con-

vention, as adopted in 1929, is still in effect as to the United States.

It is in the light of the conditions and circumstances which existed at the time the Treaty was adopted that the Convention must be read, with a view to effecting the objects and purposes of the contracting parties. *Nielsen* v. *Johnson*, 279 U. S. 47, 57-58 (1929).

Courts are not at liberty to interpret a Treaty in the light of changing conditions. So long as the Treaty remains in force, in its unamended state, courts are bound to give effect to the intent of the parties as expressed in the plain language of the Treaty.

In the case at bar, the reasoning and the decision of the Court below are in conflict with the plain language of the Treaty and the purposes sought to be achieved by the parties when the Convention was adopted in 1929. To support its decision, the Court does not refer to any provision of the Treaty, but rather relies upon the rationale of inapplicable decisions in *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), and *Warren* v. *The Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).[4] Petitioner does not dispute the correctness of the abstract principle of law established by the *Mertens* and *Warren* cases that the Treaty provides for absolute unlimited liability for non-delivery of the passenger ticket within the meaning of

[4] Both of these cases dealt with the timeliness of the ticket delivery, and whether the carrier had accepted the passenger without a passenger ticket having been delivered within the meaning of Article 3(2). In *Mertens*, the aircraft was almost ready to taxi for takeoff when the ticket was delivered to the passenger on board the aircraft. In *Warren*, the passengers were handed the tickets at the foot of the stairs leading into the aircraft as they were boarding the aircraft for the flight. In either case no question was raised or decided concerning the conformity of the contents of the passenger tickets with Treaty requirements.

Article 3(2) of the Convention. The plain language of the sanction in Article 3(2) supports this conclusion.

Petitioner does challenge as error, however, the use by the Court below of the underlying rationale of the *Mertens* and *Warren* decisions as a basis for interpreting Article 3(2) to require delivery of a ticket which notifies the passenger that the Treaty limits the carrier's liability in the event of a crash. Such an interpretation amounts to nothing more than an extension, by judicial decision, of the sanction in Article 3(2) to cases where the delivered passenger ticket fails to contain the statement in Article 3(1)(e), contrary to the intent of the parties to the Convention, expressed both in the plain language of the Treaty and its drafting history. See Points I and II, *supra*, pp. 8-24.

The Court below rejected the language of the Convention, stating that it was merely relevant to its decision. 370 F.2d at 511 (A. 94a). The plain language of a treaty has always been regarded by this Court as determinative of the intent of the parties, and not merely relevant to that intent. The Court below totally disregards the drafting history of the Convention which confirms the intent of the parties expressed in the language of the Treaty. Neither the language of the Convention, nor its drafting history, permits any interpretation of Article 3(2) other than that urged by petitioner, namely, that the sanction in Article 3(2) does not apply for the failure of the passenger ticket to contain, in effect, the statement in Article 3(1)(e).

IV

The passenger tickets and baggage checks delivered by Alitalia contain a statement that the transportation is subject to the liability rules of the Convention.

For many years, it has been the uniform practice in the air transport industry to incorporate the passenger ticket and the baggage check into one document. Consistent with this practice, the passenger tickets delivered by Alitalia in this case are also the baggage checks, and are so designated (A. 21a-57a).

On the cover of this dual-purpose ticket, each passenger is cautioned to examine the ticket carefully, particularly the conditions appearing on page 4. The conditions on page 4 provide in substance that the transportation is subject to the rules and limitations relating to liability established by the Warsaw Convention.[5]

In addition, each flight coupon and passenger coupon in the ticket explicitly states that the Warsaw Convention may be applicable and that "the Convention governs and in most cases limits" the carrier's liability for death or personal injury and loss of or damage to baggage.[6] Each

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[5] Condition 2(a) states:

"2(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention'), unless such carriage is not 'international carriage' as defined by the Convention." (A. 23a, 53a, 57a).

[6] The following statement appears directly under the passenger's name on each coupon:

"If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." (A. 25a-37a, 41a-51a).

coupon also contains a statement that the ticket and baggage check are issued "Subject to the Conditions of Contract on page 4" (A. 21a-57a).

Upon examination of the passenger tickets and baggage checks delivered by Alitalia, the Court below held that, because of the size of type used and their location on the tickets, these statements did not satisfy what the Court construed to be the requirements of the Treaty. 370 F. 2d at 513-514. The Convention itself, however, is silent on the location of the statements and the size of type to be used. Nor did the Hague Protocol of 1955 amending the Warsaw Convention require that the statement be printed in a specified type size or in contrasting color, as proposed by the United States. I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 124.

The Court below also took the position that the statement in the passenger ticket and baggage check must notify the passenger that the Treaty limits the carrier's liability in the event of a crash. 370 F. 2d at 513. The Convention, however, does not require this. Strict adherence to the provisions of Article 3(1)(e), relating to the statement in the passenger ticket,[7] and Article 4(3)(h), relating to the statement in the baggage check, would merely require:

> *"A statement that the transportation is subject to the rules relating to liability established by this Convention."* 49 Stat. 3014, 3015.

Significantly, it was only as a result of the amendments to Articles 3 and 4 adopted at the Hague Conference in 1955 that any reference to the Treaty limits of liability was required in the passenger ticket and baggage check. II IN-

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[7] Petitioner maintains that Article 3 does not make the inclusion of this statement in the passenger tickets compulsory in any event, as held by the Court below. See Point I, *supra*, page 8.

TERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 2-3.

Even though the Hague Protocol was not in effect at the time of the accident involved in this case, the passenger tickets and baggage checks delivered by Alitalia contained the language of the statement adopted at the Hague Conference. Alitalia's passenger tickets and baggage checks contained the Hague language because the International Air Transport Association (IATA), subsequent to the Hague Conference, had revised the standard passenger ticket and baggage check to include this new form of statement. In approving this revised form of passenger ticket, the Civil Aeronautics Board of the United States, specifically with regard to the language of this statement, said:

> *"The new form is much clearer and informative than the one now found on the ticket."* [8]

With regard to the location of the statement on the ticket, the Civil Aeronautics Board gave the carrier the option of inserting it either on the outside front cover or on each passenger coupon of the ticket. 24 C.A.B. 575 at 577-8. In actual practice, however, the statement is inserted both on each flight coupon and on the passenger coupon, directly under the name of the passenger.

Every reported case we have found which has considered the adequacy of these statements as they appear on the standard airline passenger tickets, baggage checks, and air waybills, has held that the statements satisfy the requirements of the Treaty. *Seth* v. *British Overseas Airways Corporation,* 329 F. 2d 302 (1st Cir. 1964), *cert. denied,* 379 U. S. 858 (1964); *Eck* v. *United Arab Airlines, Inc.,* 20 A. D. 2d 454, 457 (1st Dep't. 1964), *rev'd on other grounds,* 15 N. Y.

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[8] *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations,* 24 C.A.B. 575, 577 (1957).

2d 53 (1964); *Manufacturers Hanover Trust Co.* v. *American Airlines, Inc.*, 23 A. D. 2d 832 (1st Dep't. 1965); *Samuel Montague & Co.* v. *Swiss Air Transport Co.* [1966], 1 Lloyd's List. L.R. 323. See also, *Ross* v. *Pan American Airways, Inc.*, 299 N.Y. 88, 95, 85 N.E. 2d 880, 884 (1949); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Against this wall of uniform authority, the decision of the Court below stands alone.

In conclusion, it is submitted, the passenger tickets and baggage checks delivered by Alitalia contain all of the particulars listed in Articles 3(1) and 4(3), including a statement as to the applicability of the liability rules of the Convention, and comply fully with the Warsaw Convention.

V

In any event the question of the readability of the passenger ticket and baggage check should be decided by a jury.

The Court below has held, as a matter of law, that the standard airline passenger ticket and baggage check in daily use throughout the world is unreadable. In so holding, the Court below has deprived petitioner of a jury trial on this issue. Petitioner submits that the question of print readability should be decided by a jury. U.S. Const. amend. VII.

As stated by Judge Moore in his dissenting opinion:

> *"Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury."* 370 F. 2d at 515 (A. 102a).

CONCLUSION

The judgments of the Court below should be reversed, and the cause remanded with instructions to deny plaintiffs' motion for partial summary judgment.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

THOMAS J. WHALEN
of Counsel

December 21, 1967

Certificate of Service

I hereby certify that I have this 21st day of December, 1967, served the foregoing Brief for Petitioner upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, and Arnold Holtzman, *amici curiae,* by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner